UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

UNITED STATES POSTAL SERVICE	)	
and	)	**Case 08-CA-197451**
AMERICAN POSTAL WORKERS UNION Local 170	)	

RESPONDENT'S POST HEARING BRIEF

Respondent, United States Postal Service ("Postal Service" or "Agency"), pursuant to Section 102.42 of the Board's Rules and Regulations, as amended, hereby submits its post-hearing brief. According to the order of Deputy Chief Administrative Law Judge Arthur J. Amchan, post-hearing briefs must be submitted on or before April 27, 2018.

For the reasons set forth in more detail below, Respondent requests that the allegations set forth in Charge 08-CA-197451be dismissed. Specifically, the evidence and testimony presented demonstrate no violation of Sections 8(a)(1) and (5) of the Act.

I. BACKGROUND

This Complaint arises out of the unfair labor practice charge filed by the Charging Party, Michael Fincher, Motor Vehicle Craft Director for American Postal Workers Union Local 170. G.C. Exh. 1(a). The charge alleged that, since "about March 25, 2017, Employer has refused to bargain with American Postal Workers Union Local 170 over the Employer unilaterally changing the break schedule and unilaterally reducing the time

for breaks." Subsequently the original Complaint in this matter was filed on August 29, 2017, G.C. Exh. 1(b), followed by an Amended Complaint filed on January 12, 2018, G.C. Exh. 1(k). Neither the union's grievance, the grievance settlement, the Charge nor the original Complaint sought backpay as a remedy. It was only when the General Counsel filed the Amended Complaint that backpay was sought for the change in employees' break times.

However, the testimony and evidence shows that notice was given and therefore unilateral bargaining did not occur. Furthermore, even if unilateral bargaining did occur, the General Counsel's remedy of backpay is not supported by the law or the facts of this case. For all these reasons and the statement of facts and argument below, the Amended Complaint should be dismissed.

A. Statement of Facts

1. The employees in question work in a United States Postal Service vehicle maintenance facility ("VMF") in Toledo, OH. (Tr. p. 23). There are 17 technicians and three clerks in the bargaining unit (the "Unit"). (Tr. p. 23).

2. Prior to March 2017, employees in the Unit took two 15 minute breaks per shift. (Tr. p. 25).

3. On March 3, 2017, VMF supervisor Tom Baker[1] held a safety talk, or staff meeting, to discuss several issues, one of which was break times and the break schedule. (Tr. p. 27, 28).

4. At that meeting Mr. Baker announced that break times would be reduced from 15 to 10 minutes. (Tr. p. 70, 84).

[1] Mr. Baker is now the Acting VMF Manager (Tr. pp. 22-23)

5. Mr. Fincher testified that he did not recall hearing about the change in break times at the March 3, 2017, meeting. (Tr. p. 48, 60).

6. However, subsequent testimony by three bargaining unit members contradicted Mr. Fincher's self-interested denial. (Testimony of Eric Schneider, Tr. pp. 86-87; Testimony of Greg Piskula, Tr. p. 90; Testimony of Stephen Recknagel, Tr. p. 94). All three clearly remembered Mr. Baker announcing at the March 3, 2017, Safety meeting that break times were being reduced from 15 to 10 minutes.

7. Furthermore, there was uncontradicted testimony that the break schedule was being changed because the break times were being abused. (Group of employees taking 40 and 50 minutes for breaks – testimony of Eric Schneider Tr. p 86).

8. Based on his prior experience and training as a steward, and his understanding of the joint contract interpretation manual ("JCIM" - Respondent's Ex. 2), Mr. Baker testified that he believed the notice to the union of the change in break times was adequate, and that written notice was not required. (Tr. p. 70-71).

9. Both Mr. Fincher and Mr. Baker read from the JCIM and testified that it did not require written notice to change a past practice (Tr. p. 60 – Mr. Fincher; Tr. p. 70 Mr. Baker).

10. Mr. Baker's uncontradicted testimony on notice was that "Notice can be verbal, written. I mean, as long as you notify the union, give them adequate time to bargain." (Tr. p. 70).

11. Subsequently, Mr. Baker posted a revised schedule on March 18, 2017, for the week of March 25, 2017. (GC Exhibit 2) (Tr. p. 83).

12. When asked why he waited two weeks to post the schedule, Mr. Baker testified that it was "To allow the union time to complain, have any issues, bargain, or file a grievance." (Tr. p. 83).

13. The union filed a grievance after the schedule was posted, claiming that the schedule change was a violation of "binding past practices." (GC Exhibit 5). The sole remedy sought by the union in that grievance was to "Cease and desist, rescind the scheduling of breaks and lunches, and return to the past practice consistent prior to 3/20/17." (GC Exhibit 5; Tr. pp. 57-58).

14. The General Counsel attempted to impeach Mr. Baker's testimony that he gave notice on March 3, 2017, by questioning him on GC Ex. 7 (grievance summary Step 1) about why Mr. Baker didn't specifically mention in his grievance denial that break times were being cut from 15 to 10 minutes. (Tr. pp. 80-81)

15. However, that attempt is contradicted by the fact that Mr. Baker denied the grievance as untimely in GC Ex. 7 because, as Mr. Baker testified, he told the union and employees in the March 3 meeting that the break times would be reduced to 10 minutes. (Tr. p. 84).

16. To be timely, the grievance should have been filed within 14 days of the March 3, 2017, meeting (or by March 17). (Tr. p. 80)

17. Even though the grievance was denied at step 1 as untimely, it was ultimately upheld at step 3 on September 26, 2017. (GC Exhibit 6). Consequently, management was ordered to reinstate the 15 minute breaks.

18. The grievance did not seek, and the step 3 did not award, any backpay for the approximately 6 month period that employees in the Unit were required to take 10 minute breaks.

19. Furthermore, per Article 8.2.C of the collective bargaining agreement ("CBA") between the parties (Respondent's Ex. 3), break times are not referenced in the CBA but are compensable (paid) time. (Tr. p. 102).

20. There was also uncontradicted testimony that employees who did not take breaks did not receive overtime compensation, and likewise employees who took extra-long breaks would not have their pay reduced. (Tr. p. 110).

B. ARGUMENT

Summary of argument:

- Unilateral bargaining did not occur because adequate notice was given, and therefore the Act was not violated;
- The charge does not support the revised remedy of backpay
- Case law does not support the remedy of backpay

1. Unilateral bargaining did not occur:

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment without providing the Union prior notice and an opportunity to bargain. Liberty Bakery Kitchen, Inc. & Int'l Bhd. of Teamsters, Local 653, 366 NLRB No. 19 (Feb. 16, 2018). A unilateral change case "does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto without bargaining." Kerry, Inc. & Local 70, Bakery, Confectionery, Tobacco Workers & Grain Millers Int'l Union, AFL-CIO, 358 NLRB 980, 1001 (2012).

The issue in this case is whether there was proper notice to the union. The General Counsel cites Ciba-Geigy Pharmaceuticals v. International Chem. Workers' Union, 264 NLRB 1013 (1982**)** for the proposition that the union was not given "proper" notice because it was given to the union representatives as employees and not separately to the union. However, that is a misinterpretation of the Ciba-Geigy decision. Ciba-Geigy is a case about *fait accompli* and direct dealing, and not really about the issue of notice that the General Counsel alleges.

The Board's subsequent decision in Champion International Corp*.,* 339 NLRB 672, 687 (2003), cited the Ciba-Geigy decision for the proposition that a bargaining demand by the union would be futile where the unilateral change is presented by the employer as a *fait accompli*. "[A] union's demand to negotiate will be considered futile when an employer presents a new policy as a fait accompli, indicating that it is unwilling to deal with the union in good faith." Champion International Corp*.,* 339 NLRB at 687, citing Ciba-Geigy, supra. The Board's decision in Champion International Corp. does not support the General Counsel's theory that simultaneous notice to employees and their union representatives is improper notice under *Ciba*-Geigy.

Rather, the ALJ in Champion International Corp. cited *Ciba*-Geigy both for the *fait accompli* theory and in the context of direct dealing. The Board upheld the ALJ's *fait accompli* finding.

Conversely, the use of *Ciba*-Geigy in the second context, direct dealing, was not upheld by the Board. The ALJ held that he could reasonably infer "that [the employer] was engaged in negotiations directly with employees before the Union learned of the new policy change." Champion International Corp., 339 NLRB at 686-687. The ALJ further held "that by presenting the plan directly to employees before notifying the

Union, the Union's negotiating role was significantly undermined." Champion International Corp., 339 NLRB at 687. [2]

So it is arguable that the case relied on by the General Counsel, *Ciba*-Geigy, does not support the proposition for which it is adduced. The case does stand for the *fait accompli* theory, and it might even stand for the direct dealing theory. But the General Counsel's reliance on this case for the idea that simultaneous notice is improper is misplaced, especially since the General Counsel has not alleged direct dealing in his pleadings.

Respondent asserts that the presentation of the proposed schedule change on March 3, 2017, was not a *fait accompli.* As Tom Baker credibly testified, he waited two weeks after that meeting to post the new schedule to "allow the union time to complain, have any issues, bargain, or file a grievance."

Furthermore, the two weeks' notice was timely. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. Ohio Edison Co., A Wholly Owned Subsidiary of Firstenergy Corp*., 362 NLRB No. 88 (May 21, 2015*), enforcement denied, First Energy Generation Corp. v. NLRB, 847 F.3d 806 (6th Cir. 2017).[3]

[2] The Board did not agree that direct dealing was properly pleaded and therefore reversed the ALJ's finding in this regard. "We do not find a separate violation based on the theory that the Respondent engaged in unlawful direct dealing. This matter was neither alleged in the consolidated complaint, nor did the General Counsel subsequently amend the complaint to include this allegation." Champion International Corp., 339 NLRB at 673.

[3] Furthermore, the ALJ in Ohio Edison also cited the Ciba-Geigy decision for the *fait accompli* standard, not the issue of notice per se. ("The standards utilized by the Board in determining whether a union is presented with a fait accompli are set forth in *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982): Ohio Edison Co., A Wholly Owned Subsidiary of Firstenergy Corp., 362 NLRB No. 88 (May 21, 2015))".

The ALJ in Ohio Edison cited WPIX, Inc., 299 NLRB 525, 526 (1990), to support the conclusion that the Unions were not presented with a fait accompli under the standards set forth under *Ciba*-Geigy, 264 NLRB at 1017. Ohio Edison, 362 NLRB No. 88. Under the facts of WPIX, Inc,, a union representative, by chance, noticed a memorandum to employees notifying them of the January 1, 1989, change in the reimbursement rate shortly before Christmas in 1988. The Board reversed the ALJ's finding of a violation because the Union "received actual notice of the change more than a week prior to the implementation of the new reimbursement rate." WPIX, Inc., 299 NLRB. In the instant matter, there was two weeks' notice before the schedule change was implemented, which is sufficient notice.

2. The remedy of backpay was never alleged in the Charge

The General Counsel lacks the authority to investigate unfair labor practices on its own initiative. Instead, it may investigate only (a) allegations set out in a properly filed charge, and (b) matters "closely related" to those allegations. *See* Precision Concrete v. NLRB, 362 F.3d 847, 852 (D.C. Cir. 2004) (citing NLRB v. Fant Milling Co., 360 U.S. 301, 309 (1959)). Whether a new matter is "closely related" to a properly filed allegation depends on whether the matter shares a legal or factual basis with the allegation. *See* id. For example, a new matter is not closely related to the allegation where it rests on different underlying conduct, different sections of the Act, or a different legal theory. *See* Reebie Storage & Moving Co. v. NLRB, 44 F.3d 605, 608 (7th Cir. 1995). *See also* Leukemia and Lymphoma Society, 363 N.L.R.B. No. 123 (2016) (Miscimarra concurring) (observing that General Counsel does not have "carte blanche" to investigate matters not raised in the charge).

Here, the union's grievance and charge never sought backpay as a remedy. Nor, as a matter of fact, did the General Counsel's original complaint. The claim for backpay is untimely and should be barred under section 10(b). This is a punitive remedy fashioned entirely by the General Counsel and should be rejected out of hand.

3. Case law does not support the remedy of backpay

Indeed, under relevant Board precedent, it is questionable whether the reduction in break times was even a material change in terms and conditions of employment for members of the Unit. If so, then there is no violation of the Act.

> The question that remains is whether this unilateral change in breaktime rules amounted to a 'material, substantial and significant change' in the terms or conditions of employment at Mitchellace. If it was not, then, notwithstanding the unilateral action, Mitchellace did not violate the Act. E.g., Peerless Food Products, 236 NLRB 161 (1978).

In Re Mitchellace, Inc., 321 NLRB 191, 193 (1996). (*See also* fn. *6 for examples of employer action held not to have material, substantial, and significant effects.).*

Furthermore, Board cases that have held that unilateral reductions in break times were violative of the Act have not awarded backpay as a remedy. In Lake City Management. & SEIU Local 556, AFL-CIO, 303 NLRB No. 18 (May 24, 1991), the Board held that, on or about March 27, 1990, the Respondent unilaterally reduced employee breaks from 15 to 10 minutes. The remedy for this violation was **not** backpay.

> Having found that the Respondent has unlawfully failed and refused to meet and bargain with the Union, has acted unilaterally in altering employees' terms and conditions of employment, and has dealt directly with employees rather than through their designated collective-bargaining representative, we shall order it to meet and bargain on request with the Union, to return break times to their original duration, to afford the Union an opportunity to bargain before making any changes in the employees' terms and conditions of employment.

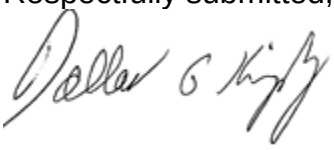
Likewise, in Postal Service, 275 NLRB 360 (1985), the ALJ found that the Postal Service violated Section 8(a)(5) by unilaterally reducing rest breaks for certain clerical employees from 15 to 10 minutes without notifying and bargaining with the Union. The ALJ's remedy was to recommend "that the 10-minute rest break policy for Tour III employees be rescinded and withdrawn." Postal Service, 275 NLRB at 370.[4] Therefore, even if a violation of the Act is found in this matter, backpay is not an appropriate remedy.

III. CONCLUSION

Based on all of the foregoing evidence and argument, Respondent maintains that all of the allegations set forth in the Amended Complaint should be dismissed.

DATED this 27th day of April, 2018.

Respectfully submitted,



Dallas G. Kingsbury
Attorney for United States Postal Service
Law Department – NLRB Unit
1720 Market Street, Room 2400
St. Louis, MO 63155-9948
(702) 361-9349 (office)
dallas.g.kingsbury@usps.gov

[4] The Postal Service filed exceptions and on review the Board dismissed the complaint. The Board held that the evidence was clear that all employees were aware of the Respondent's policy on 10 minute rest breaks. Postal Service, 275 NLRB at 361.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's Post-Hearing Brief** were sent this 27th day of April, 2018, as follows:

VIA E-FILING:

HONORABLE THOMAS RANDAZZO
ADMINISTRATIVE LAW JUDGE
NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE DIVISION
1015 HALF STREET SE, WASHINGTON, DC
20570-0001

CHARGING PARTY

Michael L. Fincher
Motor Vehicle Craft Director
American Postal Workers Union-Local 170
P.O. Box 695
Toledo, OH 43697-0695

VIA E-mail

Stephen M. Pincus
Counsel for the General Counsel
National Labor Relations Board, Region 8
AJC Federal Building, Room 1695
1240 East Ninth Street
Cleveland, Ohio 44199

Dallas G. Kingsbury
Attorney for United States Postal Service